

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
: Docket #17cv6559  
RUBIK'S BRAND LIMITED, : 1:17-cv-06559-PGG-KHP  
:  
Plaintiff, :  
:  
- against - :  
:  
FLAMBEAU, INC. et al., :  
: New York, New York  
Defendants. : January 25, 2021  
----- : REMOTE ORAL ARGUMENT

PROCEEDINGS BEFORE  
THE HONORABLE KATHARINE H. PARKER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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THE CLERK: Calling case 17-civil-6559, Rubik's Brand versus Flambeau, the Honorable Katharine H. Parker, presiding.

Beginning with counsel for the plaintiffs, can you please make your appearance for the record?

MR. MARK PEROFF: Mark Peroff, Darren Saunders, Jason Kasner, and Cassandra Tam.

THE HONORABLE KATHARINE H. PARKER (THE COURT): Good afternoon, everyone. Who'll be doing the argument for RBL?

MR. PEROFF: This is Mark Peroff, and I'll be doing the principal argument. To the extent that we require to supply document information and exhibits, I will be assisted by the other attorneys in the room.

THE COURT: Okay. Thank you, Mr. Peroff.

THE CLERK: And, counsel for the defendants, can you please make your appearance for the record?

MR. MATTHEW J. DUCHEMIN: Yes. Good afternoon. My name is Matt Duchemin, spelled D-u-c-h-e-m-i-n. I'm from Quarles & Brady. And along with me is my associate, Anita Boor, B-o-o-r, and our associate Edgar Matias, who hasn't appeared but just recently joined us at the firm and wanted to get a sense for how these things go. I'll be --

THE COURT: Welcome.

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MR. DUCHEMIN: Oh, thank you, Judge.

THE COURT: I'm sorry, I didn't mean to cut you off. You'll be primarily doing the argument, Mr. Duchemin?

MR. DUCHEMIN: Yes, your Honor. Thank you. As Mr. Peroff suggested, if I need some supplementation of the record and other things, I might ask Ms. Boor for some help.

THE COURT: Okay. No problem.

Welcome, everyone. Happy New Year. Normally, I like to have oral arguments in the courtroom; it's easier for everyone to see one another. But, unfortunately, we're still amidst this pandemic. So just a few preliminary matters before we get started. I'd ask counsel to keep their phones on mute unless they are speaking. That allows for the best clarity of reception for everyone; it minimizes echoing. So please keep your phones on mute. And we are making a recording of this call so that you can order a transcript. It has to be ordered within three days of today because of the platform that we're using. This line is open to the press and public on a listen-only basis, and I want to remind everyone on the call that the Court prohibits others from making recordings of and rebroadcasting court proceedings and that violations of this rule may result in sanctions. And, finally, although Mr. Peroff is going to be principally arguing for RBL and

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Mr. Duchemin is going to be principally arguing for

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Flambeau, to the extent there are other attorneys who are

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asked to speak or invited to speak, I ask that you state

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your name clearly for the benefit of any court reporter

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who's asked to transcribe this proceeding.

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So I want to thank you all for your excellent

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briefing on both sides. I did think it would be helpful to

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have argument, and I'm going to invite Mr. Duchemin, since

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it's your client's motion, to start.

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MR. DUCHEMIN: Thank you very much, your Honor.

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And just perhaps one housekeeping issue, is there a

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specific time limit on today's argument, so that I might be

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able to focus my lengthy outline on the issues, your Honor,

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I would really like to focus on?

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THE COURT: Yes. I'd like you to -- I want to

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devote no more than an hour to today's arguments. So I'm

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going to give you plenty of time to make your point, but if

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you could limit our time to, you know, 20 minutes to half

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an hour, that would be appreciated. And the same for RBL.

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MR. DUCHEMIN: Will do, your Honor. Thank you very

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much.

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And so let me begin by just starting sort of with

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an overall framework for this motion and this case. We've

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obviously moved for summary judgment on all of RBL's

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2 claims. Those claims essentially assert various trade  
3 dress-related claims, and in Flambeau's mind do so really  
4 in an anticompetitive manner, to the detriment of the  
5 marketplace for puzzle cubes.

6           Essentially, RBL is attempting to extend a  
7 monopoly afforded by expired patents by trying to claim  
8 trade dress protection for purely functional features. And  
9 this effort to double-dip is not supported by the law and  
10 should not be sustained. Now, for --

11           THE COURT: Well, let me stop you for a second. Am  
12 I correct that RBL applied for the trade dress protection  
13 prior to the expiration of the patents?

14           MR. DUCHEMIN: That's true, your Honor. They did  
15 so, although that, we believe, is legally irrelevant when  
16 it comes to assessing the functionality of those features.

17           THE COURT: Okay.

18           MR. DUCHEMIN: So the case, obviously, is large  
19 and complex, 543 proposed material facts, 60 pages of  
20 briefing, dozens of cases. But, really, what I'd like to  
21 focus us on I think is the issue that can resolve this case  
22 in its entirety, and that's functionality. Functionality is  
23 a complete statutory defense here. It's case dispositive,  
24 and so I'm going to focus, you know, the beginning of my  
25 remarks on that issue. However, even if the Court does find

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2 the trade dress in this case functional, we believe it  
3 should still dismiss the case because RBL cannot meet its  
4 burden of proving a probability of likelihood of confusion.  
5 And that evidence, that analysis of confusion, also reveals  
6 undisputed evidence which makes clear that RBL cannot prove  
7 dilution.

8           We also, as your Honor knows, make an argument  
9 that this registration was procured by fraud and should be  
10 cancelled, so I'll try to address that probably more  
11 briefly. And if we get there, we believe that there are  
12 good reasons for the Court at this stage, even, to preclude  
13 an effort by RBL to recover profits in this case based on  
14 the equity.

15           So with that in mind, I'm going to focus right  
16 away on trade dress.

17           THE COURT: Okay.

18           MR. DUCHEMIN: And functionality, I should say,  
19 your Honor. And as your Honor knows, trademark law is  
20 primarily concerned with protecting source identification,  
21 the origin of a product. And this case is about trade  
22 dress, the design and packaging of a product. It is not a  
23 case about a word mark, it's not a case about the brand of  
24 Rubik's or the word mark "Rubik's Cube." Those are not  
25 asserted in this case. What is asserted in this case is a

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2 trade dress involving the product, the 3 x 3 puzzle cube.  
3 And in the context of trademark law this is important  
4 because, you know, copying is not always discouraged or  
5 disfavored by the laws. RBL will argue that Flambeau copied  
6 the product. It didn't; we don't think it did. But even if  
7 that's the case, that's not discouraged. Trade dress  
8 protection has to subsist with the recognition that there  
9 is no prohibition against copying goods and products unless  
10 it's protected by a patent or a copyright. And the purpose  
11 of functionality and the functionality defense is to help  
12 draw the line in between those various frameworks for  
13 protecting intellectual property.

14           You know, in this case -- and the Southern  
15 District has found this in the *Schutte Bagclosures* case --  
16 the nonfunctionality requirement for trade dress protects  
17 competition, and it does so even at the cost of potential  
18 consumer confusion. Stated another way, the law allows for  
19 potential confusion when it comes to functional products.  
20 And it's critical --

21           THE COURT: Well, let me ask -- let me interrupt  
22 you on the issue of functionality. Do you have any evidence  
23 of functionality based on the cost? Specifically speak to  
24 the comparative cost of colored stickers in the 3 x 3 cube  
25 design versus other colors. In other words, you did make



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2 some arguments about the cost of black plastic being  
3 cheaper, but I didn't see any comparative evidence, what  
4 the cost is to do a black versus white puzzle cube or the  
5 specific color patches used by or color patches used by  
6 Rubik's versus the ones used by Flambeau.

7 MR. DUCHEMIN: So, yes, your Honor. As it respects  
8 costs, there is evidence in the record -- and I'm going to  
9 have Ms. Boor [indiscernible] -- sorry, I accidentally hit  
10 the mute button -- find that for me. But the cost in the  
11 record pertains to the black plastic used to manufacture a  
12 cube versus white plastic used to manufacture a cube. And  
13 so just by definition of the opinion evidence that's in the  
14 record that the black plastic is less costly, that is  
15 comparative. It is comparative to all other plastics. And  
16 so the evidence does in fact support that the design  
17 selected by RBL solely with respect to the black plastic  
18 has a cost advantage. We're not making the same claim with  
19 respect to the colored stickers.

20 THE COURT: Okay. All right. I wanted to get  
21 clarification with regard to the colored stickers.

22 I did see some general statements that primary-  
23 colored stickers are cheaper and that red dye is expensive,  
24 but I didn't see any more details about the particular --  
25 the context of the stickers at issue here.

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MR. DUCHEMIN: That's a good reminder for me, your Honor. Yes, that is in the declaration, I believe, of Mr. Loets, that that's in there, as well, so yes.

And importantly, I don't want to lose sight of sort of the first and we think most important inquiry on functionality because your Honor is moving into really questions about the Morton-Norwich factors and other evidence. But we don't think your Honor even needs to get there in this case if we follow the established framework for assessing functionality as taught by the *TraFFix* case and the *Schutte* case. And those two cases, your Honor -- and we're talking about utilitarian functionality initially --

THE COURT: Yes.

MR. DUCHEMIN: -- those two cases really make clear that the first and most important question is to look at the use and purpose of the puzzle cube as claimed in the registration and as used, at least in the context of the common law claims in this case, and to ask the question looking at that product only is it essential to the use or purpose of the product.

And so we could talk about that, but the

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analysis in this case, it's our contention, can really stop there because we believe the evidence, the undisputed evidence, clearly supports a finding of utilitarian functionality. And so all of the other arguments and evidence about alternatives and the Morton-Norwich factors and other things, the Court is not obligated to consider those in deciding the utilitarian functionality question. And we really --

THE COURT: Let me ask you a question about this functionality because you talk about and you have experts talking about this maximum color contrast, making the design of the -- making it easier to solve and to solve faster. And -- but you would concede, would you not, that you can still solve the puzzle if other colors were used. I mean, your colors are not the exact same as Rubik's. And there are other decisions involving the Rubik's Cube discussing the fact that there are limitless color combinations. So do you concede that there are other colors out there, that it's not -- I mean, why are you saying it would be essential to the function to --

MR. DUCHEMIN: Sure, your Honor. Thank you.

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2 Right. So the evidence I believe you're talking  
3 about are the other alternatives in the  
4 marketplace. And so we believe that looking to  
5 those first in the context of what *TraFFix* teaches  
6 is not appropriate. Those are alternatives, and  
7 what *TraFFix* says is you don't look at all the  
8 alternatives -- and, yes, you know, a puzzle cube  
9 can be solved by matching symbols or matching  
10 raised features or matching other colors, but those  
11 are alternatives. What we have to start with  
12 here -- and *TraFFix* and the Supreme Court are clear  
13 on this -- is that we have to start with a product  
14 as asserted in the registration and ask looking at  
15 that registration, looking at that product, are the  
16 features essential to the use or purpose of the  
17 article or does it affect the cost or quality of  
18 the article. And *TraFFix* -- just to be clear,  
19 *TraFFix* is very clear on this. *TraFFix*, the Supreme  
20 Court says that, you know, if you look at that and  
21 you conclude that they're functional, quote, "There  
22 is no need, furthermore, to engage, as did the  
23 Court of Appeals, in speculation about other design  
24 possibilities, such as using three or four springs  
25 which might serve the same purpose." And it goes

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on, Here, the functionality of the spring design means that competitors need not explore whether other spring juxtapositions might be used. The dual-spring design is not an arbitrary flourish in the configuration of MBI's product; it is the reason the device works. Other designs need not be attempted."

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And that's really important here. I'm happy to talk about the alternatives because I do think that they can't be done as quickly, they can't be done easily. And there are serious competitive disadvantages that are undisputed in the record.

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THE COURT: Well, so in that regard, in looking at -- if I were to say that I did need to look at alternatives, hypothetically, if I said that, notwithstanding your argument about *TraFFix*, why is the puzzle, the quickness by which it can be solved an appropriate metric to measure this? Isn't the speed cubing population just a small subset of the buyers of the cubes?

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MR. DUCHEMIN: While the buyers may be a small subset, it is the speed cubing, as addressed in various articles and in various press clippings, it's the speed cubing and the world cubing

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2 associations and others like it that are now  
3 driving the marketing of these devices. That's  
4 what you're reading about. You're reading about,  
5 you know, popular people like this Mr. Park, who  
6 has autism but competes in these World Cubing  
7 Association events. These are the things that are  
8 getting the headlines, these are the things that  
9 are driving the marketing and the sale of these  
10 cubes. And it's undisputed in the record that  
11 trying to or having a cube that is more difficult  
12 to solve, either because it uses similar shades of  
13 colors or because it uses numbers or symbols, which  
14 incidentally aren't even allowed by the World  
15 Cubing Association rules, that that is a serious  
16 competitive disadvantage. And it's not as  
17 though --

18 THE COURT: Well, but, again, I ask is it  
19 appropriate to evaluate quality and functionality  
20 just with respect to speed and speed cubing,  
21 because the *Schutte* case that you mention says that  
22 the Court should analyze trade dress functionality  
23 in the context of how it is most commonly used in  
24 the market. And given that there are millions and  
25 millions and millions of these puzzles sold and

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that, I think, in the record you indicate that

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there's less than 100,000 in the speed cubing

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arena, how is your argument consistent with that

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proposition from *Schutte*?

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MR. DUCHEMIN: Sure. So I think that the

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relevant question, I believe, is how is the

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registration that's asserted in this case used in

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the marketplace, and so we need to look to the

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registration and the cost and quality issues as to

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the registration.

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Jumping ahead to all of the potential

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alternatives, it puts the cart before the horse as

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it respects *TrafFix* -- that's very clear in

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*TrafFix*. And so when we look at -- just take cost

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and quality by looking at the registration in this

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case, you know, we can go to the words of Mr. Rubik

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himself. On the question of color he says, "It's

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very simple and very easy to distinguish. It's the

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most simple way to mark the solve state." It

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doesn't have to use numbers, so order -- he doesn't

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say this, but, you know, this is other evidence in

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the case that, unlike numbers, color doesn't

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require ordering it in the brain. That means it's

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a better-quality cube; setting aside the cost

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2 question, it's a better-quality cube.

3 THE COURT: Well, again, why is that  
4 quality? I mean, puzzles, don't puzzles range from  
5 easy to more difficult? Is it possible that some  
6 people might want a more difficult puzzle that  
7 required more brain power? Who says that quality is  
8 just the speed in which the puzzle can be solved?

9 MR. DUCHEMIN: All of the target audience  
10 of the accused product, your Honor. I mean, the  
11 accused product is designed and marketed solely for  
12 the purpose of speed cubing competitions and fast  
13 cubing. And so when we're comparing the asserted  
14 registration against that, that becomes an  
15 extremely relevant consideration in this case.

16 There are other --

17 THE COURT: I see, then your client's  
18 product is only focused on speed cubing? You're  
19 saying that's its focus?

20 MR. DUCHEMIN: Yes, your Honor.

21 And there are other quality issues here.  
22 So, you know, the maximum contrasting color issue  
23 that your Honor mentioned is important, not just  
24 for speed, because it makes it more easily -- to  
25 just solve the puzzle. You know, the fact that you



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2 can use primary and secondary colors instead of  
3 tertiary colors helps with that. Complementary  
4 colors on the color wheel provide that maximum  
5 contrast. These are undisputed facts.

6 And these go to the heart of the  
7 utilitarian functionality of it. But it does --

8 THE COURT: So let me ask you a question.  
9 How does the color depletion doctrine -- and you  
10 talk about, you know, there only being three  
11 primary and three secondary colors -- how does this  
12 color depletion doctrine play into functionality,  
13 if at all?

14 MR. DUCHEMIN: So, really, I think that is  
15 a factor -- that's really an issue that goes to the  
16 arguments regarding aesthetic functionality, so,  
17 again, I would consider that sort of step four in  
18 my analysis. I think we need to look at utilitarian  
19 functionality by looking at the registration. Then  
20 we can look at the patent issue. Then we can look  
21 at alternatives, and then we look at aesthetic  
22 functionality. And so the color depletion  
23 doctrine, from a competitive standpoint, if we get  
24 all the way there, which I don't think your Honor  
25 needs to, what the result of that is is that it

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2 makes there be an extremely limited number of  
3 choices for cubes that competitors can make. I  
4 think that the evidence supports the conclusion  
5 that it would essentially be about five different  
6 cubes, you have to limit yourself to six colors,  
7 and the six colors being the primary and secondary  
8 colors asserted. Remember, RBL's position in this  
9 case isn't just that you can't use those six  
10 colors; you can't use any shade of those colors,  
11 which we think is not supported by the law in this  
12 case like the *J. Frankl* case.

13 So the color depletion issue is really one  
14 about reducing the available options for  
15 competitors to use to make a cube that can be used  
16 in these popular speed cubing and other events.

17 THE COURT: Okay.

18 MR. DUCHEMIN: So just briefly, your Honor,  
19 on the question of sort of where we think that the  
20 analysis should begin and end, it's really looking  
21 at the design as a whole; a black cube, nine square  
22 color patches on six spaces; both being all the  
23 same color in the solve state and the starting  
24 state; and then the red, white, blue, green,  
25 yellow, and orange colors. And what I found

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2 interesting initially about RBL's opposition is  
3 they don't really talk about anything other than  
4 the colors. It's almost as though they concede that  
5 the black cube and the nine square patches and the  
6 ability to put them in a solved and mixed state is  
7 functional. I'm not seeing a real argument that  
8 it's not. And they focus on the color not being  
9 functional.

10           So the evidence in this case, you know, is  
11 pretty clear that this whole design is functional.  
12 I mean, there are admissions from RBL's own  
13 witnesses. Statement of Fact 205 there's an  
14 admission that the play value of the 3 x 3 Rubik's  
15 Cube, the play value of the cube is to scramble the  
16 smaller colored segments and then solve the puzzle  
17 by matching the light-colored segments on each  
18 side. That shows that the nine segments are  
19 functional. There's evidence that the color is the  
20 way to gauge whether the cube is solved or not. So  
21 the color's functional, and, you know, so on and so  
22 forth.

23           And the analysis can really stop there.  
24 There's no question that this cube cannot be solved  
25 in the absence of using the registered -- you know,

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the registration and the design. Ms. Riehl, RBL's

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corporate designee on this topic, confirmed that

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functionality in Statements of Fact 210 and 211,

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which cite to her deposition, Exhibit 60, at pages

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75 to 76 and 215 to 216. So if you look at the way

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this cube works, it's a 3 x 3 color-matching

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puzzle -- that's how they describe it -- color-

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matching puzzle. And you mix it and match the

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colors; that's functional. And then I would

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supplement that by just reiterating the quality

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issues and the cost issues that we just discussed.

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And our position is --

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THE COURT: Right. Let me interrupt you for

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a second about the distinction between the 3 x 3

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puzzle design, because the function of the cube is

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to provide a puzzle and to have a -- is a puzzle to

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solve. And if your cube is white with different

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shades of colors but still can be solved, does that

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not undercut your argument about functionality?

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MR. DUCHEMIN: I don't think so, your

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Honor, because our design is equally functional.

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It's not even equally functional; our design is

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also functional. I would argue that our design with

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a white base is not as good as using a black base

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2 because of the maximum-contrast issue, but I would  
3 argue that our cube is functional for the same  
4 reasons that the Rubik's Cube is functional.

5 THE COURT: Okay.

6 MR. DUCHEMIN: So if we go beyond -- and  
7 this is the inward formulation, right? *TrafFix*  
8 talks about the inward formulation and makes clear  
9 that you can stop there and you don't have to  
10 consider alternatives and other evidence. So  
11 that's where we think it should stop, the inward  
12 formulation.

13 If we go beyond that, the first thing I  
14 would mention are the utility patents, your Honor.  
15 And I think the law is pretty clear here that this  
16 is -- utility patents are of vital significance in  
17 resolving trade dress claims because things in  
18 utility patents claim and discuss functional  
19 features by definition.

20 And there's a couple of things I want to  
21 just make clear at the top. The law allows us to  
22 look to not just claims, which is what RBL argues,  
23 but the law also allows us to look at the  
24 specification and the figures and comments made in  
25 the prosecution history. Even the -- and I

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2 apologize I don't cite this -- but even the  
3 Trademark Manual of Examining Procedure makes that  
4 extremely crystal clear by citing *TraFFix*. And  
5 *TraFFix* says that; *TraFFix* says, you know,  
6 statements made in the patent applications and in  
7 the course of procuring the patents demonstrate the  
8 functionality of the design.

9           So if we look at all the patents that have  
10 been tendered in the record in this case, your  
11 Honor, you'll see not only claims but discussions  
12 in the specifications about all of the registered  
13 features. And it's the Nichols patent, the four  
14 Rubik's patents and the Gustafson patent, and there  
15 are other patents. And so I'm not going to --  
16 obviously, I don't have time to go through each of  
17 them and show you, but our brief cites to the  
18 record where each of the registered features, the  
19 asserted features, are discussed in the patent. And  
20 RBL takes issue with our citation to specification  
21 because they're not claimed, but it's important to  
22 recognize that, you know, not everything's going to  
23 be claimed in a patent because, guess what, there's  
24 a whole bunch of prior art, and color as a concept  
25 had been claimed in a prior art. There's a

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2 discussion in the specifications about that.

3 But even if we need to find a claim  
4 involving color, there is one. Claim 8 in the  
5 Rubik's 387 patent, the second Hungarian patent,  
6 Docket 159-23, Claim 8 claims color as an element  
7 of the invention. That -- and these patents, in  
8 our view, strongly support that these are  
9 utilitarian functions. And so I would say, you  
10 know, if you go beyond the inward formulation, you  
11 go to patents, and then you can stop there.

12 THE COURT: Well, what about the fact that  
13 the patents don't specify the particular colors and  
14 even specify that other things could be used? I  
15 mean, can the patents be read as relating to the  
16 twisting mechanism rather than the particular color  
17 combination claimed as RBL's trade dress?

18 MR. DUCHEMIN: Yes, good question, your  
19 Honor. So, number one, I think the claim that I've  
20 just cited is broad enough to include all of the  
21 six colors; it just says "color." So I would argue  
22 that it's covered by the patent, number one. Number  
23 two, *TraFFix* deals with this, right. So *TraFFix*  
24 involved a case of the dual-spring design. And  
25 what the Supreme Court saw was a dual-spring design

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2 in the patent that was, quote, "very different,"  
3 end quote, than the dual-spring design used in the  
4 asserted trade dress. And the Court said it didn't  
5 matter; it's functional because it's a dual-spring  
6 design that operates to help keep a sign upright in  
7 the wind. And the same thing is true here. The  
8 colors on the cube are functional, as admitted by  
9 their witnesses, because they allow the cube to be  
10 solved, period.

11 THE COURT: So are you saying the Court in  
12 the prior cases involving the Rubik's Cube got it  
13 wrong when they found that there was a likelihood  
14 of success on the merits and that the design was  
15 not functional?

16 MR. DUCHEMIN: I'm glad you reminded me of  
17 those cases. What I'm saying about those cases,  
18 which are really old, in the '80s -- I wouldn't say  
19 real old, because that makes me seem younger than I  
20 am --

21 THE COURT: But they involve this  
22 particular product.

23 MR. DUCHEMIN: Well, here's the problem,  
24 your Honor; they all predated *TraFFix*. And *TraFFix*  
25 was really sort of a pronouncement by the Supreme



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Court as to how this analytical framework should work and how this analysis should be done. The other problem with those cases is that they were involved on preliminary injunction type relief and they weren't findings by the Court on summary judgment or findings by a jury after a trial. And I would say the last issue is that they involve a very limited discussion of certain patents; they don't involve a discussion of the broad scope of all of the dozen or so, maybe even more, patents that we cite in the record in this case. So it's an incomplete record, in our view, of what the utility patents disclose to the world.

THE COURT: Okay. Let me ask you another question because we're coming to the close of half an hour. Suppose I were to reject your arguments concerning functionality and fraud, would you then concede that the 3 x 3 cube design is presumptively protectable due to the trademark registration?

MR. DUCHEMIN: Fraud and functionality --

THE COURT: Assume I -- if I were to reject that, do you concede that the 3 x 3 cube design is presumptively protectable because it was registered?

MR. DUCHEMIN: Well, I would say this. There's a presumption that the registration is valid, which is rebuttable, and I want to talk briefly about that, but not the common law portion of the claims; there wouldn't be a presumption there. And so as it respects the presumption, I want to make clear that the law, I think, is pretty strong on this, that your Honor really shouldn't give this particular registration any weight. And the reason is because the patent and trademark office, when it prosecuted this registration, it issued two separate denials on functionality, and then a different examiner was assigned and the registration was published and allowed without any comment. And the case law, I believe it's -- oh, it's the *Schutte* case, which has almost identical-type circumstances, where there was absolutely no discussion as to why it was allowed after a functionality rejection. And the Court said under those circumstances, we don't give the registration really any weight. And I don't think you should give this registration any weight for the same reason. We don't know why the patent and trademark office decided the features were not functional;

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there's no explanation.

THE COURT: Okay.

MR. DUCHEMIN: Briefly, on likelihood of confusion, if I have time, your Honor?

THE COURT: Yes.

MR. DUCHEMIN: I really want to highlight two -- well, a couple of things with that. Number one, there's no argument about actual confusion in this case. Four years of coexistence, three years of litigation, not one shred of evidence that says there was actual confusion. And this has been recognized by the courts as, you know, allowing for the conclusion that there isn't a probability of likelihood of confusion. So that's point one.

Point two, the similarity of the marks analysis. Your Honor, if we look at these -- and this really involves looking at not only just the product at issue but the product as packaged and sold -- and if we look at the products and we look at how they're packaged, we see two, you know, distinctly different products. Yes, they're both 3 x 3 puzzle cubes, but one has a white base and one has a black base. Why is that issue important? To get their registration, RBL, its predecessors,

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told the patent office that the design of its

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product -- what did it say -- the design features

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of applicant's product as shown in the drawings are

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not essential to effective competition or to any

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other factor. Cube puzzles such as manufactured by

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applicant can be formed of any color plastic

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material desired. They need not be formed of black.

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So they got their registration by saying

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people can compete by using colors other than

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black, and now they're asserting the registration

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against the 3 x 3 cube that's not black; it's

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white, it's the opposite.

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And they say the same thing about the shape

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of the segments; they say square segments. And

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they say colors, right? People don't have to use

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square segments, people don't have to use colors.

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Well, Flambeau doesn't. Flambeau uses segments that

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have corners cut out of them -- this is the speed

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cubing context. And Flambeau uses fluorescent

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versions of these colors, not the typical primary

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and secondary versions of these colors that are

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designated in the Pantone Color Guide that Rubik's

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uses. And the law says you shouldn't be able to

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claim trademark protection over shades of every

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2 color. That would severely limit competition. Or  
3 geometric shapes.

4 And then --

5 THE COURT: So are you saying the  
6 [indiscernible] doctrine applies in that regard, if  
7 I were to get to the Polaroid test, that this also  
8 plays into your argument that their trade dress  
9 shouldn't be viewed to protect all shades of their  
10 colors?

11 MR. DUCHEMIN: I think yes, your Honor. I  
12 think what it is is it's a balance. They're trying  
13 to claim extremely broad trademark rights when it  
14 comes to making an infringement argument, but they  
15 only obtained a registration by confirming that  
16 they were seeking narrow rights. It's really the  
17 *have your cake and eat it too* argument, and I don't  
18 think that's sustainable here. I think that when  
19 you're weighing the Polaroid factors, you should  
20 consider the scope that RBL's predecessors conveyed  
21 to the offices what the scope of their invention  
22 would be, which is not -- not invention --  
23 registration, which is not a registration over  
24 every single shade of the color red, white, blue,  
25 etc. And that's not how they use it, right. Their

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rights are defined by how they use the product, and they haven't used it with fluorescent colors. So if you look at these products side by side, they're different.

THE COURT: Right.

MR. DUCHEMIN: And then also on similarity, I think it's really, really important here that well-known house brands are emblazoned on these packaging and on the cubes themselves. It's undisputed the Duncan brand, which has been used since 1929, Duncan Toys Company is a well-known name in the toy industry. It's been continuously used; they have a product in the hall of fame. And that name, the Duncan Quick Cube, is on every single package. And so that really strongly counsels for a finding of no confusion, and, you know, there's a reason why nobody's been confused. And they have to come forward with evidence that just doesn't show it's possible there'd be a likelihood of confusion; they have to prove -- it's their burden of proof -- it would be probably on these facts.

So I've got a --

THE COURT: Why --

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MR. DUCHEMIN: -- lot of other things.

THE COURT: Yes. Make your last point, and then I'm going to hear from Mr. Peroff.

MR. DUCHEMIN: Sounds good. One more point on the likelihood-of-confusion factors. You're going to hear a lot about the strength of the mark or how this mark is a famous mark. And what's important, I think, to note there, your Honor, is there is no evidence tendered in this case tying these fame and strength arguments to the specific design that's claimed in the registration, as opposed from the alleged fame or recognition of Rubik's or Rubik's Cube, you know, these trademarks and this brand in general. And the law requires a very specific level of proof when it comes to demonstrating the strength or the secondary meaning of a mark. It has to be vigorously applied here, and they don't have testimony that ties it specifically to the design. So that's that issue.

THE COURT: So are you saying that when a consumer looks at your cube next to the Rubik's Cube, that the consumer would not know the black-space cube to be Rubik's, would not assume that to be Rubik's; is that what you're saying?

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MR. DUCHEMIN: Well, I don't -- there's no evidence that --

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THE COURT: That's the trade dress that they're claiming in the registration, the color, right?

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MR. DUCHEMIN: Yes. And this is where I have to be -- I was really careful when I first started working on this case because, you know, I grew up playing with a Rubik's Cube. And so we have to set aside, you know, our predispositions about that and look at what the evidence actually shows. And there's no survey in this case, there's no survey evidence, there's nothing that ties the evidence to the design specifically, as opposed to the brand. So even though a cube is in a movie or somebody might refer to a black base with these colors as a Rubik's Cube, that's not tied specifically to the design; it could be tied to the brand or the use of the Rubik's Cube name as a whole. And so the really -- the issue here is a failure of proof. In the absence of some survey that shows that customers tie it to the asserted registration, they can't prove the mark has secondary meaning or is strong.



2 THE COURT: But in all of the -- the images  
3 of the cube don't necessarily involve the mark or  
4 the logo of Rubik's, so I guess I don't understand  
5 your point about the lack of -- how the evidence of  
6 the Rubik's Cube being in all of these various  
7 product placements, advertisements, hall of fame,  
8 etc., with this design, how that doesn't -- how  
9 that isn't evidence of fame.

10 MR. DUCHEMIN: It's really an issue --

11 THE COURT: I guess I don't understand the  
12 distinction that you're making between the Rubik's  
13 logo or Rubik's as opposed to the trade dress.

14 MR. DUCHEMIN: Yes, as I think RBL  
15 concedes, the market is saturated with other 3 x 3  
16 puzzle cubes that are black and use the same  
17 colors, and there's evidence of that. And they're  
18 not Rubik's Cubes. And so the requirement of proof  
19 in this case is to come forward with evidence that  
20 ties the specific trade dress to a single source.  
21 And so when Rubik's makes and sells cubes or  
22 authorizes people to do so, they always use their  
23 name; they put "Rubik's" on the packaging. And in  
24 these movies and things, you'll hear them called  
25 "the Rubik's Cube." And so there's no apportionment

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2 or specific tying of that evidence to the small  
3 number of specific features in the registration, as  
4 opposed to some other sort of more general, "Oh,  
5 it's the Rubik's Cube." And that's important when  
6 you have a market that's saturated with cubes that  
7 look a lot alike; there has to be some proof that  
8 those features are, you know, tied to the  
9 registration.

10 And I would say this doesn't apply to the  
11 Flambeau Quick Cube or the Duncan Quick Cube,  
12 because it doesn't look anything like the Rubik's  
13 Cube; it's white and has fluorescent colors and has  
14 different shapes and whatnot. But I mean, I guess  
15 that's where I would leave that one, your Honor.

16 THE COURT: Okay. Thank you.

17 Mr. Peroff, I'll hear next from you.

18 MR. PEROFF: Hello, your Honor. I don't  
19 want to be funny, but I'm a little puzzled by the  
20 arguments that have been advanced, to use a play on  
21 words. I look at the case very differently than the  
22 counsel for the defendant. In the short period of  
23 time that you have allotted me today I would like  
24 to focus my remarks on the underpinning of this  
25 dispute that's currently before the Court, in other

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words, explaining the protection that RBL is seeking if they would obtain an injunction barring the defendant from continuing to sell the Rubik's Cube as it's currently designed.

To do so, we really have to begin by defining the trademark and trade dress; and, as the Court is aware, this Rubik's Cube was developed and designed by Mr. Rubik in 1974 and was first sold in the United States in 1980, over 40 years ago, and 35 years before the defendant even contemplated entering the cube puzzle market with its cube puzzle that would directly compete with the Rubik's Cube toy puzzle. One has to question why a business would select to enter into a market for a product that is very, very, very, very similar to the existing product that has been wildly successful and well-recognized as one of the most famous brands and trademarks in the world if it hadn't really acquired a distinctiveness.

The lawsuit here only concerns the trademark and trade dress of one product, and that's the classic 3 x 3 version of the Rubik's Cube puzzle, which has the nine small cubes on each of its sides, 54 small cubies, that has a grid

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appearance [indiscernible], etc. The Rubik's Cube predecessor filed an application, the Ideal Toy Company, to register the outward appearance of the cube puzzle toy as a configuration of the product in the USPTO two years after it launched the product in the United States and was granted a registration a year and a half thereafter, after, I would say, a rather extensive prosecution history.

The Certificate of Registration defines the trademark as follows: A mark that consists of a black cube having nine color patches on each of its six faces, with the color patches on each face being the same, and consists of the colors, red, white, blue, green, yellow, and orange. To be clear, it is important to understand that the Rubik's Cube design mark is made up of a combination of all of the elements that I just mentioned; in other words, the trademark and trade dress is not merely a black cube, nor is it merely a cube that has nine color patches on each of its faces that could be any color, nor is it a cube having nine color patches in which each of the patches on their respective faces are the same, nor is the mark -- consists of a cube having the colors

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red, white, blue, green, orange and yellow patches.

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No, rather, it's a unique combination of each of

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these elements that creates the distinctive

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appearance of the Rubik's Cube that the USPTO

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accepted for registration on the principal register

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38 years ago, with the recognition that the trade

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dress of this cube was entitled to be registered as

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a trademark because the mark as a whole had

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acquired distinctiveness as the result of

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substantial sales, advertising promotion.

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The Rubik's Cube --

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THE COURT: Can I ask -- Mr. Peroff --

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MR. PEROFF: Yes.

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THE COURT: -- let me direct you for a

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second with respect to the [indiscernible] because

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the --

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MR. PEROFF: Respect to what?

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THE COURT: -- registration itself does not

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specify the particular Pantone colors that RBL has

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been using and specifies that be used --

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MR. PEROFF: That's true.

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THE COURT: -- to your licensees. So are

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you claiming that every shade of these colors is

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subsumed within your trade dress?

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MR. PEROFF: No, no, not at all. What we are claiming is that, to the extent that a competitor is selling a 3 x 3 cube that is so similar in its overall appearance and the commercial impression that's created, that there's a likelihood of confusion.

THE COURT: Okay.

MR. PEROFF: Now, red can come in all shades of red; it can come in, you know, pale pink, it can come in rouge, it can come in all kinds of colors. Of course not. But when you look at the combination of the elements that I just mentioned, that is the mark. And you must look at the mark, not by individual elements to determine likelihood of confusion, but as the mark as a whole. And in our view, when you look at the Flambeau product and compare that to our product, there is a substantial similarity. Are they identical? No, I'm not claiming they're identical. But that's not where the test for trademark infringement or likelihood of confusion. Consumers rarely see products side by side and deliberate what the individual characteristics are.

Rather, consumers, and particularly these

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consumers, who are unsophisticated for the most part, look how the general sense of what a product looks like and react to that. And in this respect we believe that the Flambeau cube is far too close. There was a world of colors they could have chosen, a world of shades they could have chosen, perhaps. But they didn't do that. They came as close as they possibly could to the Rubik's Cube, thinking that they could get away with it. With no investment in product development, 35 years after our client's product had been on the market, they stepped into a premade cube that was being manufactured by a Chinese manufacturer and selected one of a number of different models, like, this is great, we'll use this one.

So I think it's a very important concept for you to grasp or for the Court to grasp that it's the combination that we're talking about and must be viewed when determining whether or not there is a --

THE COURT: So --

MR. PEROFF: -- functionality and would be a likelihood of confusion.

I'm sorry, go ahead.

THE COURT: So let me ask you this

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2 question, Mr. Peroff. Let's say, hypothetically,  
3 that the Court rejects Flambeau's arguments as to  
4 functionality and fraud, and gets to the various  
5 factors on confusion, the Polaroid factors, do you  
6 agree that not all the factors need to be in  
7 Flambeau's favor for it to be granted summary  
8 judgment?

9 MR. PEROFF: Do I agree that not all of the  
10 factors --

11 THE COURT: Need to be met.

12 MR. PEROFF: -- yes, I do, but -- that's  
13 true. But I would also say that there has to be a  
14 balancing of the factors. Some factors are more  
15 important than others, so it depends upon which  
16 factors you're talking about. If you're relying  
17 upon that there's been no evidence of actual  
18 confusion, that is not a factor that I put great  
19 emphasis on. But if you're talking about --

20 THE COURT: What factors do you put -- what  
21 factors do you put the greatest emphasis on?

22 MR. PEROFF: Well, number one is the  
23 defendant's intent in adoption of the trade dress  
24 for their product. The record is full of obvious  
25 efforts to simulate the Rubik's Cube product -- the



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2 Rubik's Cube trade dress, I should say. That's  
3 number one. Number two, the goods are identical,  
4 you know, legally identical; and the appearance,  
5 the overall commercial appearance of the products  
6 are very, very similar. So I would say those three  
7 factors to me are very compelling. And the fourth  
8 factor, which is equally compelling, is that they  
9 are sold through the same channels of trade to an  
10 unsophisticated population of parents of kids that  
11 are eight to fifteen. The vast majority of the  
12 millions of cubes that have been sold have been  
13 sold to that market, not to the very small market  
14 of competitors, cuber competitors. That's a very,  
15 very tiny market, which both sides would admit.

16 And, in addition to that, the relative  
17 cost; I mean, the products are not expensive  
18 products and are very often purchased on impulse,  
19 so that there's a greater chance of confusion. And  
20 because of the low cost of these products, it's  
21 sort of a reason why there isn't really evidence of  
22 actual confusion because who's going to return a  
23 product that costs 5.99 in today's world, especially  
24 during COVID. So it sort of undercuts it. And if  
25 the buyer thought -- the buyer purchased the

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2 defendant's product, that's proof of actual  
3 confusion, because they would have bought ours.

4           So we really contend that every sale that  
5 has been made by the other side has really been a  
6 diversion of sales because they chose to adopt the  
7 appearance and trade dress of a product that is so  
8 similar there was no need to do so. This case  
9 never had to be brought to Court; it could have  
10 been settled 1, 2, 3. Just change the colors; just  
11 make some other adjustments that avoid the -- which  
12 we think is the probability of likelihood of  
13 confusion.

14           THE COURT: So how do you address the  
15 defendant, Flambeau's, argument about  
16 [indiscernible]? You heard what Mr. Duchemin said,  
17 and he was trying to make a distinction between  
18 Rubik's as the source or the brand versus the trade  
19 dress. So what do you say to that?

20           MR. PEROFF: What I say is there are so  
21 many countless examples in the record where the  
22 word "Rubik's" does not appear and the product does  
23 appear. The fame of the product is synonymous with  
24 the iconic appearance, the unique, distinctive  
25 appearance of this product. So I don't think one

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relies on the other at all.

THE COURT: Okay.

MR. PEROFF: Obviously, every product has to have a name, but -- and I'm not saying the Rubik's mark is not well-known -- but the appearance of the design of the product can certainly stand on its own two feet.

THE COURT: Where would you say the Rubik's design falls on the Abercrombie inherent distinctiveness scale?

MR. PEROFF: Well, I can tell you --

THE COURT: Is it [indiscernible] or descriptive, and why?

MR. PEROFF: No, no, well, if you look at the trademark registration as a guide, the mark is arbitrary, but it was registered on the basis of that acquired distinctiveness and on the Principal Register. And during the first five years of registration, that creates a rebuttable presumption, but after five years it's conclusive evidence that the mark is distinctive, conclusive. There's no distinction between a registration that is granted under Section 2(f) of the Trademark Act and one that is not on the Principal Register. Both

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are considered to be distinctive.

THE COURT: So is it your position, then, that the Court need not get into any kind of secondary-meaning analysis, given this -- the registration?

MR. PEROFF: Well, absolutely. It need not do so legally or technically; however, to the extent there's any doubt whatsoever, there is ample, ample, evidence of acquired distinctiveness. But it's not necessary at all because the registration now is conclusive evidence; nothing further is needed.

THE COURT: Okay. Can you address Flambeau's argument related to *TrafFix*? It spent a great deal of time saying that the Court need not look at the -- need not even get to alternatives and relying on the patent that specifies this as being a color-matching puzzle?

MR. PEROFF: Well, yes, I can. First of all, they keep mentioning that -- the defendant keeps mentioning that there's no need for the Court to address alternative designs. But on page 5 of the brief, they fully support this, that there's no functionality. The *TrafFix* case states

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unequivocally that in this examination of

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functionality, you look at the claims set forth in

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the patent. Now, you may also look at other aspects

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of the [indiscernible] for more -- to further

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explain what the claims are, but it is the claims

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that are being asserted in the patent and that it

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registers is what is really the fundamental

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consideration. And in that regard, every case has

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to be decided on a case-by-case basis. The facts

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of the *TraFFix* case are totally different from the

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facts in our case. So to me, it's a very clear

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statement of what the law should be, but it really

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has to be applied to what the facts are in the

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case. And --

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THE COURT: All right --

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MR. PEROFF: -- in this particular case, no

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one's claiming that -- we're not -- we have a

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unique combination of colors that appear in a grid

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format on a black background that constitutes the

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mark. So the entirety of the claimed trade dress

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that was claimed in the patent is just different.

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Here, colors are not being claimed in any -- were

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never claimed in any patent, none of the patents,

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and certainly not these particular colors.

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THE COURT: Okay. And you have not separately cross-moved for summary judgment, although you state that the Court can grant summary judgment in your favor. But why -- what evidence do you think would permit the Court to grant summary judgment as a matter of law --

MR. PEROFF: The same evidence --

THE COURT: -- [indiscernible]

MR. PEROFF: -- that's already in the record.

THE COURT: -- on the issue --

MR. PEROFF: I'm sorry. I just --

THE COURT: Yes, on this issue of confusion, the --

MR. PEROFF: I'm sorry. I'm --

THE COURT: -- [indiscernible]. I'm just -- what do you think is your strongest evidence that you would succeed under the Polaroid factors or should succeed under the Polaroid factors on summary judgment versus trial?

MR. PEROFF: So let me -- if I may state it in other words? What you're asking me is what would be the basis for my client to ask for a ruling in its favor on the likelihood of confusion

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2 aspect of the case; is that what you're asking me?

3 THE COURT: Yes. I'm sorry -- yes, that's  
4 what I'm asking.

5 MR. PEROFF: That's all right. That's  
6 okay. I just wanted to make sure I understood you  
7 correctly.

8 Well, basically, when you look -- it's the  
9 same set of facts. And one has to evaluate, when  
10 you look at the record, which is, you know,  
11 hundreds if not thousands of pages, that to me  
12 evidence is and supports findings for each one of  
13 the Polaroid factors, with the exception of one,  
14 that they favor us. And the one that does not  
15 favor us is one that we think is mutual, and that's  
16 the factor of actual confusion, which is clearly  
17 not a requirement in finding likelihood of  
18 confusion, never has been and just isn't. So I  
19 think there's enough there for the Court to grant  
20 summary judgment in our favor because if we --  
21 let's say we -- let's assume that we didn't make  
22 that request and we go forward in the case, we're  
23 going to be putting in the same evidence, the same  
24 thing that we have already before the Court;  
25 there's nothing more to add.

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THE COURT: Okay.

MR. PEROFF: Did I answer your question? I want to --

THE COURT: You did. You did. Thank you very much.

I will give Flambeau five minutes for any significant points it would like to make in reply.

MR. DUCHEMIN: Thank you, your Honor. So just to clarify -- and I'll go sort of in reverse order, I think -- to clarify, you had raised the question about *TrafFix* and whether we should go to a discussion of alternatives. And I think counsel answered maybe about patents, and there was a little confusion there. So I just want to clear that up. You know, *TrafFix* is clear, as is the *Christian Louboutin* case, as is *Specialized Seating*, that if under the Inwood formulation, you look at the registration and you determine, as RBL's own witness said, that that puzzle cannot be solved in the absence of those features -- and that's functional -- then here's the specialized statement of it. The existence of available alternative designs cannot turn a feature that is functional under the traditional definition into a



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2 nonfunctional feature which is the exclusive trade  
3 dress of one seller. So the inquiry can end. If it  
4 doesn't end there for you and you move on, then  
5 that becomes a question about the patents.

6           And I want to make sure I clear a couple of  
7 things up. The law in this is clear that you're  
8 allowed to consider things beyond the claims, and  
9 you're allowed to consider prosecution history and  
10 other portions of the patent. Even if the features  
11 aren't claimed, those other things can be evidence  
12 of functionality. And it really makes common sense  
13 because an individual patent may not have a claim  
14 over something that had already been invented 20,  
15 30 years ago. And the idea of the cube being  
16 functional was already invented.

17           I want to talk briefly about good faith,  
18 because they claim that we don't have good faith,  
19 which is not supported by the record at all. To be  
20 clear, copying is not evidence of good faith.  
21 Copying doesn't mean -- excuse me, bad faith --  
22 copying doesn't mean bad faith. Copying is  
23 encouraged and allowed by the law. What Flambeau  
24 did was it had a product idea, and before it  
25 launched it for sale, it went to its attorney and

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2 said, "Can we do this?" And the attorney, who was  
3 somebody that had been practicing trademark law for  
4 30 years, looked at the registration, looked at a  
5 product sample, looked at some patents and said,  
6 you know what, you're allowed to do what's in the  
7 patents because they're expired. So that's a  
8 nonissue. And RBL's predecessors told the patent  
9 office that you can use a white cube because that  
10 won't infringe. And that's what they did. And  
11 then they used different shades of colors because  
12 they told the patent office that the colors could  
13 be different. So that's not bad faith; that's good  
14 faith. That's Flambeau saying I'm going to use a  
15 white base, not a black, because that doesn't  
16 infringe; and I'm going to use a functional design  
17 and a patent. That's exactly what's supposed to be  
18 allowed.

19           Okay, as far as this consumer purchaser  
20 sophistication issue that was referenced, I want to  
21 make clear that the channels of trade are somewhat  
22 different. Flambeau sells to retailers directly,  
23 like Target and Staples. And those retailers, the  
24 evidence shows, have sophisticated purchasers in  
25 their departments, and they purchase in bulk

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2 pursuant to arm's length contracts. Yes, there are  
3 some direct sales to consumers, but you can't just  
4 gloss over that the majority of sales by Flambeau  
5 aren't being made directly out to the general five-  
6 to-eight-year-old and their moms and dads public;  
7 they are made to sophisticated consumer purchasers.

8 THE COURT: But ultimately, isn't it the  
9 ultimate consumer that the Court is supposed to  
10 look at? I mean, these products are sold side by  
11 side in major retail stores.

12 MR. DUCHEMIN: I think it's both, your  
13 Honor. And I just didn't want to gloss over the  
14 point that the retail purchasers that purchase the  
15 vast bulk of the products from Flambeau are simply  
16 not confused. They are sophisticated retail  
17 purchasers. And there is no evidence of any  
18 confusion among any of these other consumers. They  
19 like to say consumers think or consumers believe or  
20 consumers -- but there is not a shred of evidence  
21 from a consumer in this case. There's no survey. I  
22 mean, most trademark cases will involve a survey  
23 where the consumer is found to say to some  
24 probability that they associate the design and the  
25 registration and the competitive product. And they

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don't have that here.

They said every sale is a diversion of an RBL sale. To be clear, they aren't even seeking compensatory damages in this case measured by diverted sales or lost sales. Their interrogatories and their 26 disclosures do not seek their own lost profit. So to now suggest that somehow sales are diverted, when there's not even any evidence of that in the record, is a little bit disingenuous.

As far as the Abercrombie test, it's a rebuttable presumption. And, you know, and it's not in a vacuum. Here we have a puzzle cube -- the evidence is overwhelming that there are 3 x 3 puzzle cubes on the market that RBL admits practice its design that are out there and continue to be sold. And they're not doing anything about it -- well, they're doing something. They have an enforcement program --

THE COURT: Well, isn't there evidence in the record about the significant efforts RBL has undertaken to send cease-and-desist letters and bring litigation to imitators?

MR. DUCHEMIN: They've done some of that.

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2 But if you look at the record, there are dozens and  
3 dozens of cubes that we've identified that practice  
4 the RBL design that are not being shut down. They  
5 are sold side by side with all of the other puzzle  
6 cubes. And it's almost as though it's become  
7 ubiquitous in a certain sense. So as far as whether  
8 something might have started out as descriptive or  
9 something less, it's almost as though -- like it's  
10 transformed into generic. You know --

11 THE COURT: Are you saying that the  
12 asserted trade dresses, if it ever was anything  
13 more than generic, it was descriptive?

14 MR. DUCHEMIN: That's right, your Honor.  
15 And they don't have evidence that currently it's  
16 strong with secondary meaning. And your Honor does  
17 have to consider secondary meaning in the context  
18 of the analysis. And, correct, currently, or at  
19 least at the time that Flambeau's alleged  
20 infringement began is a different question. And  
21 that's the time period you look at, not back in  
22 1981, when the Rubik's Cube exploded on the market  
23 for about two years before it fell completely off a  
24 cliff, is what the evidence shows.

25 THE COURT: So with respect to the issue of

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generic versus descriptive, doesn't the case law

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say that almost all trade dress would be fanciful

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and not descriptive or generic?

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MR. DUCHEMIN: Exact -- well, what it says,

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your Honor, is that, yes, trade dress in general,

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unlike a word mark or a brand, is -- it's not

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fanciful; it's just -- it's -- you have to apply a

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much more rigorous analysis of it because typically

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it's utilitarian. It's not really arbitrary; it's

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because typically trade dress is functional. It's

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not a presumption, but that's what the cases say.

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Because trade dress is not a word mark and involves

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features of a product, it's usually utilitarian and

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functional, and therefore you have to do a very

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vigorous analysis of it. So it's a little bit

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related with, I think, the strength analysis but

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not the same.

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THE COURT: Okay. Thank you.

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MR. DUCHEMIN: I'm just looking through my

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notes. I think I've covered just about everything.

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I guess -- I was going to touch on the fraud, but I

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think that's covered in the briefs.

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And our Motion to Strike, we're happy to

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stand on the briefs there. We think -- I just

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should mention all of these alternatives that are being proffered as evidence of things in the market, you know, they're being sponsored almost entirely by an attorney. And we just don't think that's appropriate in the context of summary judgment. That shouldn't be allowed, although I don't think it swings the decision either way, your Honor, for the reasons we've discussed.

THE COURT: All right, I want to thank both sides for their excellent arguments and their excellent briefing. And the Court will take this matter under consideration.

Thank you, both, very much.

MR. PEROFF: Thank you very much, your Honor.

MR. DUCHEMIN: Thank you, your Honor.

THE COURT: All right, we're adjourned.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Rubik's Brand Limited versus Flambeau, Inc., et al., Docket #17cv6559, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: February 2, 2021